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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

SAMUEL MOSLEY,

Respondent,

against

CIA. MAR. ADRA S.A.,

Respondent,

against

LIPSETT STEEL PRODUCTS, INC.,

Petitioner.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT CIA. MAR. ADRA S.A.

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VINCENT A. CATOGGIO,
On Petition.

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Reply to Respondent Cia. Mar. Adra

In opposing certiorari Cia Mar Adra seems to concede that but for its erroneous representation to the trial court that it had made a motion for a directed verdict as to the third party complaint at the trial (brief p. 12), it would not have been granted judgment n.o.v. So too the Court of Appeals said:

> "Cia Mar Adra in a memorandum in support of its n.o.v. motion expressly pointed out to the district court that a motion for a directed verdict had been made."

Thus judgment n.o.v. is based on a representation made to the trial court which it thus seems to be conceded, was

untrue when it was made. Thus Cia Mar Adra in effect argues that making inaccurate, if not untrue representations to our courts should be rewarded.

If it ever is possible to dispense with a motion for a directed verdict as a mandatory prerequisite to granting judgment n.o.v., certainly it should not be done in a case such as this, where the trial court preempted the function of the jury by finding that

> "any unseaworthy condition * * * was created by the stevedore".

In finding for the petitioner, the jury had answered to the following which was the whole charge as to indemnity.

> "Now, if you find for the plaintiff against the ship, then we come to the second lawsuit. The ship says we didn't create this condition; this condition was created by the stevedores; they hold themselves out as experts; we had them on board conducting this loading operation, and if there was any unseaworthy condition they created it.
>
> The ship had the right to rely on the stevedores. It has no duty to inspect their work nor to correct faulty situations, but remember that if the stevedores created an unseaworthy condition the ship is stuck with it, but the ship in that (366) situation can recover over against the stevedores for all the loss and damages to which it has been put.
>
> So if you bring in a verdict, a verdict, for example, for X dollars for the plaintiff, then you come to the next lawsuit, and the stevedores would be responsible for X dollars if you find that it failed to carry out this loading in a workmanlike manner, and in this case that means that the stevedores created an unseaworthy condition."

Cia Mar Adra took no exception to this charge.

In the Court of Appeals decision, no mention is made that the question whether the petitioner created the unseaworthiness, so clearly was submitted to the jury. Cia Mar Adra's statements at pages 11, 12, 17 and 18 that the trial court did not substitute its judgment of the evidence for the verdict of the jury, are not in accord with the facts. The trial court left no room for doubt that it was passing on the facts when it said

> "the verdict in its favor is against the weight of the evidence."

Cia Mar Adra concedes in its petition in No. 550 that

> "the scrap metal was on the deck where it was supposed to be loaded,"

Since the charge on unseaworthiness told the jury that they could find unseaworthiness because of

> "the condition of the deck"

it was reasonable and logical for the jury to decide that the petitioner was not responsible for the scrap being on the deck but that Cia Mar Adra was. There is no less reason or logic to the jury's verdict in favor of petitioner than there is to what this court said in *Weyerhauser S.S. Co., Nacirema Operating Co.*, 355 U. S. 563 at 567 that a shipowner only is entitled to indemnity when there is no

> "conduct on its part sufficient to preclude recovery."

Clearly the shipowner Cia Mar Adra caused and required the scrap to be loaded on the deck.

In an effort to forestall the granting of certiorari, Cia Mar futilely states at pages 9, 14 and 19 that the petitioner did not question the propriety of the charge on unseaworthiness in the Court of Appeals. Reference to Point

III of the petition for rehearing filed by the petitioner in that court shows that the heading was

> "The charge herein as to unseaworthiness which enlarged the sphere of a ship's liability far beyond that provided for in any Supreme Court decision was not a proper basis on which to bottom indemnity."

Of course both the majority and dissenting opinions discussed the charge of unseaworthiness and expressed views as to its propriety. Thus we again find Cia Mar Adra's statements to be in error.

Dated: New York, N. Y., September 29, 1966.

Respectfully submitted,

EDMUND F. LAMB,
Attorney for Petitioner.

VINCENT A. CATOGGIO,
On Petition.